United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

NO. 76-4274

UNITED STATES COURT of APPEALS

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

ORTIZ FUNERAL HOME CORP.,

Respondent.

B
P/S

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

ROBERT G. SEWELL,
JAMES Y. CALLEAR,

Attorneys,

National Labor Relations Board.
Washington, D. C. 20570

JOHN S. IRVING,
General Counsel,
JOHN E. HIGGINS, JR.,
Deputy General Counsel,
CARL L. TAYLOR,
Associate General Counsel,
ELLIOTT MOORE,
Deputy Associate General Counsel,
National Labor Relations Board.

INDEX

AUTHORITIES CITED

Cases:

I N D E X

Cases--Cont'd: Page

Statute:

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 76-4274

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

ORTIZ FUNERAL HOME CORP.,

Respondent.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER
OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF ISSUE PRESENTED

Whether substantial evidence on the record as a whole supports the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act by refusing to execute the contract agreed upon with the Union and by belatedly insisting that the Union include a list of bargaining unit employees in the contract.

STATEMENT OF THE CASE

This case is before the Court upon the application of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor

Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C. Sec. 151, et seq.), for enforcement of its order against Ortiz Funeral Home Corp. (hereinafter "the Company"). The Board's Decision and Order (A. 216-228),[1/] issued on September 16, 1976, is reported at 225 NLRB No. 197. This Court has jurisdiction of the proceeding, the unfair labor practice having occurred in New York, New York.

I. THE BOARD'S FINDINGS OF FACT

Briefly, the Board found that the Company violated Section 8(a)(5) and (1) of the Act by failing and refusing to execute a written contract reflecting the terms which the Company and Local 1034, International Brotherhood of Teamsters (hereinafter "the Union") had orally agreed to on April 28, 1975.[2/] The facts upon which the Board's findings are based are summarized below.

The Company is engaged in operating funeral homes and providing burial arrangements and related services at various locations in New York City (A. 217). Michael Ortiz serves as president of the Company (A. 2, 4). On January 24, a complaint in another case (2-CA-13540), which alleged violations of Section 8(a)(1), (3) and (5) of the Act, was issued against the Company (A. 217; 2, 8). On March 21, the Company and the Union signed a settlement agreement to resolve the unfair labor practice

1/ "A." references are to the Appendix to the parties' briefs. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

2/ All dates hereinafter are 1975 unless otherwise indicated.

complaint and a related strike (A. 217; 18-19, 113-114, 152-153). Pursuant to the settlement, the Company agreed to reinstate eight named employees with backpay and to recognize the Union as the exclusive bargaining representative of the employees (A. 217; 152-153). The Company specifically agreed to bargain and execute any agreement reached with the Union as representative of the employees in the unit described as (A. 217; 153):

> . . .[A]ttendants, floorpeople, receptionists, interpreters and porters, but excluding licensed embalmers, undertakers, drivers, managers, office clerical employees, bookkeepers, guards, watchmen and supervisors as defined in the Act. . . .

Subsequently, the Company granted recognition to the Union as the exclusive representative of the employees in the agreed-upon unit (A. 217). On April 4, the Company met with employees and Union business agent Michael Fleischer[3/] to determine job assignments for the reinstated strikers (A. 217; 47). The Company and the Union then conducted negotiations at the Union's offices on April 10 and 28 (A. 217; 48, 57, 114, 116). Union officials Michael Fleischer and Martin Adelstein,[4/] Union attorney Richard Weinmann, and an employee committee composed of two unit members, Pedro Serrano and Domingo Vargas, attended the sessions on behalf of the Union (A. 217-218; 21, 48). President Michael Ortiz was the only representative for the Company (A. 218; 21, 114).

3/ The surname "Fleischer" appears in the record at times as "Fleicher".
4/ The Administrative Law Judge inadvertently spelled "Adelstein" as "Edelstein".

At the April 10 meeting the Union proposed a collective bargaining agreement which became the basis for negotiations (A. 218; 48-49, 114, 171-187). Ortiz raised questions and objections about some of the clauses in the proposed contract. The major issues which were discussed at the two meetings were extra pay for group leaders, severance pay, holidays, and the Company's rules and regulations, which were not a part of the contract (A. 218-219; 52).[5/] Ortiz initially objected to the recognition clause as proposed and wanted the clause to read in accordance with the recognition clause in the settlement agreement approved by the National Labor Relations Board. The Union agreed to the changed wording. (A. 219; 50-51, 114-115.) The Union proposed that employees be granted 15 holidays and three days of bereavement leave. Ortiz offered 12 holidays to be enumerated and claimed that 15 holidays was too much. Ortiz also objected that three days bereavement leave was too much. The Union dropped the bereavement leave clause, and the Union and the Company agreed that the contract would provide for 15 unnamed holidays. (A. 219; 56-57.) Union representative Martin Adelstein explained the method of contributions and level of benefits for the severance plan trust fund. Ortiz did not suggest any changes and had no further questions regarding the clause. (A. 219; 78-79.)

5/ The proposed and agreed-upon collective bargaining agreement provided that the employer could prescribe reasonable rules and regulations which did not conflict with any of the provisions of the agreement (A. 168, 186).

At the April 28 meeting, Ortiz questioned the provision granting extra pay for group leaders; he wanted to know who the group leader was (A. 219; 60). The Company's rules and regulations had not been discussed at the prior meeting (A. 219; 79). The Union negotiating team, however, requested that Ortiz provide a copy of the rules and regulations, and Ortiz later submitted a copy to them (A. 219; 61-63, 128, 189-191). At neither of the negotiating sessions did Ortiz request that the names of unit employees be included in the contract (A. 219; 59, 69-70, 73, 78). When negotiations ceased on April 28, the Company and Union were in agreement on the terms for the collective bargaining agreement (A. 218-219; 23, 58-59, 61).

On May 1, Union representative Martin Adelstein mailed Ortiz two copies of the revised contract incorporating the changes agreed upon in the two bargaining sessions (A. 218; 83, 154-170). Adelstein's covering letter asked Ortiz to sign and return both copies to the Union, which in turn would execute the contracts and return one fully signed contract to Ortiz (A. 218; 188). Ortiz did not respond to the letter (A. 218; 84). In mid-May, Union Business Agent Fleischer came to the Company's main office to bring Ortiz another set of contracts after Ortiz advised the Union that he had lost the contracts mailed to him when his car was stolen (A. 218; 30). After receiving the contract from Fleischer, Ortiz stated that "he was going to show it to his father and return it to us signed", and that there was "no problem, you will have the contract back." (A. 218-219; 30). In the third week of May, Fleischer met with Ortiz

concerning an employee discharge (A. 218; 31). Fleischer asked Ortiz about the contract and told him that the Union had to have it (A. 32-33). Ortiz again told Fleischer that he had to show the contract to his father "out of respect" and that he would be in touch with Martin Adelstein (A. 218-219; 33). Ortiz did not raise any objections to the contract in its final form at either of these two meetings with Fleischer (ibid).

On July 10 Ortiz met with Union officials Bernard and Martin Adelstein and Union attorney Richard Weinmann (A. 220; 84). At this time Ortiz asserted there was only one question remaining before he would sign the contract and "that was involving the names of the people to be covered by the contract" (A. 84). Martin Adelstein responded that names should not be a question which should affect the signing of the agreement and that "the bargaining unit spoke for itself and whatever people that were performing this work would be covered by the agreement", and "we could resolve that through the remedies provided for in the agreement" (A. 84-85).[6/] Ortiz was reminded to send the Union a revised copy of the Company's rules and regulations which reflected changes in language suggested by the Union (A. 220; 88-90).[7/] Ortiz agreed to return to the Union's office on July 11 to sign the contract (A. 220; 90).

6/ On July 16 the Union filed a "Notice of Intent to Conduct an Arbitration" in the Supreme Court of New York, and the court subsequently granted the Company's application to stay arbitration because of the instant dispute before the National Labor Relations Board (A. 218; 102, 134-135).

7/ See supra, n. 5.

Ortiz failed to come to the Union office that day, and the Union was unable to reach him by telephone (A. 220; 90). On July 15, Martin Adelstein received a telephone message indicating that Ortiz would send the revised version of the rules and regulations and listing three names which represented the employees whom the Company believed were in the unit (A. 220; 90-91, 93-94, 192). Martin Adelstein telephoned Ortiz on July 16 and told him that the list of employees was unacceptable and that "in any event, we will resolve that question, but he was still to come up and sign the agreement" (A. 220; 91). Ortiz promised to sign the agreement on July 17 or 18, but he did not do so (A. 220; 90-91, 94-95).

II. THE BOARD'S CONCLUSIONS AND ORDER

Upon the foregoing facts, the Board concluded that, by April 28, the parties had reached agreement on the terms of a collective bargaining contract, that the Union's May 1 written contract reflected that complete agreement, and that Ortiz' July insistance on including a list of bargaining unit employees was tactically designed to delay the signing of the agreement previously reached. Accordingly, the Board concluded that the Company violated Section 8(a)(5) and (1) of the Act by refusing to sign the contract submitted by the Union which incorporated the agreement reached by the parties. (A. 221-223, 226-227.) The Board's order requires the Company to cease and desist from the unfair labor practice found against it and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights

under Section 7 of the Act. Affirmatively, the Board's order requires the Company to post the usual notices and, upon request, execute the collective bargaining agreement reached with the Union on April 28. (A. 223-224, 227-228.)

ARGUMENT

SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY FAILING TO EXECUTE THE CONTRACT AGREED UPON WITH THE UNION AND BY BELATEDLY INSISTING THAT THE UNION INCLUDE A LIST OF BARGAINING UNIT EMPLOYEES IN THE CONTRACT

The statutory duty to bargain in good faith as set forth in Section 8(a)(5) and defined in Section 8(d) of the Act includes, inter alia, "the execution of a written contract incorporating any agreement reached if requested by either party." Thus, it is well established that an employer violates Section 8(a)(5) and (1) of the Act by refusing to execute a written contract incorporating the agreement reached with a union. H. J. Heinz Co. v. N.L.R.B., 311 U.S. 514, 525-526 (1941); N.L.R.B. v. Coletti Color Prints, Inc., 387 F. 2d 298, 304-306 (C.A. 2, 1967); N.L.R.B. v. Huttig Sash and Door Co., 362 F. 2d 217, 219 (C.A. 4, 1966); Lozano Enterprises v. N.L.R.B., 327 F. 2d 814, 819 (C.A. 9, 1964). Such conduct constitutes a clear breach of the Act's bargaining obligation, since the employer's "refusal to honor with his signature the agreement which he made with a labor organization, discredits the organization, impairs the bargaining process and tends to frustrate the aim of the

statute to secure industrial peace through collective bargaining." H. J. Heinz Co. v. N.L.R.B., supra, 311 U.S. at 526. As this Court has stated, "An employer's duty to bargain under section 8(a)(5) would be empty, indeed, if after reaching agreement the employer could treat the contract as a scrap of paper." N.L.R.B. v. M & M Oldsmobile, Inc., 377 F. 2d 712, 715-716 (C.A. 2, 1967).

The existence of an agreement is essentially a factual question, and it is the Board's function to determine "whether negotiations have produced a bargain which the employer has refused to sign and honor. . . ." N.L.R.B. v. Strong, 393 U.S. 357, 361 (1969). Where substantial evidence supports the Board's finding that an agreement was reached, the Court should enforce the Board's order even though it might find otherwise if the matter were before the Court de novo. Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 488 (1951); N.L.R.B. v. Hendel Manufacturing Co., Inc., 483 F. 2d 350, 352-353 (C.A. 2, 1973); N.L.R.B. v. Marcus Trucking Co., Inc., 286 F. 2d 583, 591-592 (C.A. 2, 1961). Here, the record abundantly supports the Board's finding that the parties had reached complete agreement on April 28 and that the Company thereafter unlawfully refused to execute the agreement.

It is undisputed that, pursuant to the settlement agreement, the Company recognized the Union and met with it on April 10 and 28 to negotiate an agreement. At these two sessions the parties reviewed in detail the Union's proposed contract. That contract was met by some objections and some questions by Ortiz. But these matters (extra pay

for group leaders, severance pay, and holidays) were eventually resolved. The only question as to the contractual description of the unit was resolved by the Union's acceptance of the wording used in the Board settlement agreement to define the unit. Thus, at the end of the April 28 session the parties had reached agreement on all substantive terms of a complete agreement.[8/] As employee representative Vargas testified, "There was agreement on all provisions" (A. 61).

That a complete agreement had been reached on April 28 was further evidenced by the fact that the Union formalized the agreement in writing and mailed it to the Company on May 1, and Ortiz twice indicated to Business Agent Fleischer in May that signing the contract was "no problem" and he just wanted to show it to his father "out of respect" (A. 218-219; 30, 33). In addition, at the hearing, Company counsel tacitly conceded the existence of an agreement when he summarized the Company's bargaining position after April 28: ". . . [T]he rules and and regulations and small issues that were not completed, could have been completed . . . . [T]here were some issues, but they were not material issues. The only material issue was the number of people included in the particular unit" (A. 218; 10).

~~From these facts, the Board reasonably found that the parties had reached a full agreement on all material aspects of collective bargaining~~

8/ The matter of the Company's furnishing to the Union a copy of its rules and regulations was not part of the negotiations, but rather was merely ancillary to the contract provision allowing the Company to maintain rules and regulations so long as they did not conflict with the terms of the contract. See supra, n. 5

From these facts, the Board reasonably found that the parties had reached a full accord on all material aspects of a collective bargaining agreement on April 28 and that the Company in July firmly refused to execute that agreement. Under the principles outlined above (supra, pp. 8-9), such conduct clearly violated Section 8(a)(5) and (1) of the Act.

Before the Board, the Company sought to justify its refusal to sign the Union's contract primarily on grounds that it did not contain a list of employees in the unit. According to Ortiz, the July demand for the listing of unit employees was based on the fact that the contract of his major competitor, Ponce Funeral Home, contained such a list and that he wanted a contract like that one (A. 125-126). The Union in fact substantially incorporated the terms of its contract with Ponce into the contract presented to Ortiz (A. 43-44). However, the list of employees in the Ponce contract with corresponding wage rates was not a definition of the unit, which was contained in the recognition clause, but rather a "Wage Schedule" contained in the appendix of the contract to specify the wages of certain named employees (A. 195, 211). Ortiz apparently misconstrued the purpose of this listing in the Ponce contract which was reflected in the title of the appendix and the information contained therein.[9/] It clearly did not purport to list all employees in the unit or those in each job classification in the recognition clause.

9/ The wage rates of the named employees in Appendix B differed significantly from the minimum wage rates specified for the covered job classifications in Appendix A of the Ponce contract. (A. 210-211).

It is also evident that the listing of current unit employees was neither a necessary nor proper way of defining the unit covered by the agreement. For purposes of collective bargaining, units are defined by job classifications so that any employee performing those job tasks secures the union representation and contractual coverage that go with the unit. Here, the parties' April negotiations resulted in a unit defined, in accord with the settlement agreement, as "attendants, floorpeople, receptionists, interpreters and porters" (A. 155). The Company's July demand for a list of those then working in unit jobs would operate to redefine the unit or limit it to current employees. However, such alteration or limitation of the agreed-upon unit falls outside the area of mandatory subjects of bargaining, and the Company's insistence on the matter indicates a further breach of statutory bargaining obligation. See Douds, Regional Director v. International Longshoremen's Assn., 241 F. 2d 278, 281-283 (C.A. 2, 1957), aff'g 147 F. Supp. 103 (S. D. N.Y., 1956)(union violated Section 8(b)(3) when it attempted to bargain for a unit greater that that certified by the Board); Hess Oil & Chemical Corp. v. N.L.R.B., 415 F. 2d 440, 443-445 (C.A. 5, 1969), cert. denied, 397 U.S. 916 (employer violated Section 8(a)(5) when it insisted on the exclusion of certain members from the contractually recognized unit).

Moreover, even assuming the listing of employees in the unit was a valid concern, the Company plainly waited too long to raise the issue. The Board discredited Ortiz' assertion that this issue was raised at

at the April 28 meeting, and there is no basis for overruling that critical credibility ruling.[10/] The Company cannot lay back for three months and then inject this issue in order to avoid signing the agreement. As the Board concluded, "Ortiz raised such issue upon his own misconception of the legal purport of the Ponce contract and as a belated tactic to delay the signing of an agreement with the Union" (A. 221). Such a tactic constitutes a violation of the Act. See Lozano Enterprises v. N.L.R.B., supra, 327 F. 2d at 816-819; N.L.R.B. v. Huttig Sash and Door Co., supra, 362 F. 2d at 219; N.L.R.B. v. Mayes Brothers, Inc., 383 F. 2d 242, 246, (C.A. 5, 1967).

In conclusion, the evidence in this case demonstrates that there was a clear agreement reached on April 28. The Company thereafter unjustifiably refused to sign the contract which reflected the agreed-upon terms and conditions.[11/]

10/ The Administrative Law Judge (A. 221), affirmed by the Board (A. 226-227 n. 1), discredited Ortiz' testimony that on April 28 he asked that a list of employees in the unit be included in the contract. It is well settled that resolution of credibility is a task primarily committed to the Board and its Administrative Law Judge who observes the witnesses. N.L.R.B. v. Dinion Coil Co., 201 F. 2d 484, 487-490 (C.A. 2, 1952) (since observation of demeanor evidence is open to the trier of fact when the witness testifies orally in his presence, and since such observation is not open to a reviewing tribunal, the fact-trier's findings, to the extent they comprise direct or testimonial inferences are rarely to be disturbed); N.L.R.B. v. Warrensburg Board & Paper Corp., 340 F. 2d 920, 922 (C.A. 2, 1965); N.L.R.B. v. Bausch and Lomb, Inc., 526 F. 2d 817, 822 (C.A. 2, 1975).

11/ Before the Board, the Company urged that the Administrative Law Judge exhibited bias and prejudice by restricting examination of witnesses and refusing to allow the introduction of certain exhibits. However, the exhibits excluded related to proceedings in the New York state courts to compel arbitration. Those proceedings have no bearing here, as the Board is not bound by a state determination in that action,

(Continued)

CONCLUSION

For the foregoing reasons, we respectfully submit that the Board's order should be enforced in full.

ROBERT G. SEWELL,
JAMES Y. CALLEAR,
Attorneys,

National Labor Relations Board.
Washington, D. C. 20570

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

CARL L. TAYLOR,
Associate General Counsel,

ELLIOTT MOORE,
Deputy Associate General Counsel,

National Labor Relations Board.

March 1977

11/ and such evidence was properly excluded. N.L.R.B. v. Tonkawa Refining Co., 452 F. 2d 900, 903 (C.A. 10, 1971); N.L.R.B. v. Tennessee Packers, Inc., Frosty Morn Div., 339 F. 2d 203, 204 (C.A. 6, 1964); N.L.R.B. v. Pacific Intermountain Express Co., 228 F. 2d 170, 176 (C.A. 8, 1955), cert. denied, 351 U.S. 952 (each fact-finding agency is entitled to make its own decision upon evidence before it, and the fact that another tribunal has reached a different conclusion upon the same issue arising out of the same transaction does not invalidate any decision which has proper evidentiary support). The Administrative Law Judge in limiting the questioning of witnesses sought to prevent reaching issues which were too far removed from the instant unfair labor practice. See Bethlehem Steel Co. v. N.L.R.B. 120 F. 2d 641, 651-652 (C.A.D.C., 1941) (it is the function of an examiner to see that the facts are clearly and fully developed; he is not required to sit idly by and permit a confused or meaningless record to be made); Marine Welding and Repair Works, Inc. v. N.L.R.B., 439 F. 2d 395, 399 (C.A. 8, 1971) (right to cross-examine does not extend to the right to cross-examine endlessly), citing Food Store Employees Union, Local 347 Meatcutters v. N.L.R.B., 422 F. 2d 685, 692 (C.A.D.C., 1969). In sum, there is nothing in the instant record which would substantiate a claim of bias and prejudice.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner,	)	
v.	)	No. 76-4274
ORTIZ FUNERAL HOME CORP., Respondent.	)	

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's brief in the above-captioned case has this day been served by first class mail upon the following counsel at the addresses listed below:

N. George Turchin, Esq.
253 Broadway
New York, New York 10007

Richard A. Weinmann, Esq.
221 Park Avenue S.
New York, New York 10003

Elliott Moore

Elliott Moore
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D.C.

this 3rd day of March, 1977.